STATE OF MICHIGAN

COURT OF APPEALS

BRET D. HAWKINS and ERIN HAWKINS,

Plaintiffs-Appellants,

v

RANCH RUDOLPH, INC. and CIRCLE H STABLES, INC.,

Defendants-Appellees.

UNPUBLISHED
September 27, 2005

No. 254771
Grand Traverse Circuit Court
LC No. 03-022735-NO

Before: Meter, P.J., and Murray and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the order granting defendants summary disposition. Bret Hawkins was injured after falling off a horse during a guided trail ride conducted by defendants. We reverse and remand.

I. FACTS

On June 18, 2002, plaintiffs, who were on their honeymoon, went to defendants' stables to participate in a guided horseback trail ride. Defendants offered several different types of rides, based on age and level of experience. Plaintiffs chose the "Wrangler Ride," which was described by defendants' brochure as a "walk/trot ride" and had the minimum age requirement of eight-years-old. The ride consisted of a four-mile, single-file ride on wooded trails. Plaintiffs chose the "Wrangler Ride" because Bret had never ridden a horse before. Before participating, however, plaintiffs executed a release and indemnification waiver, in accordance with § 6 of the Equine Activity Liability Act (EALA), MCL 691.1661 *et seq*. MCL 691.1666.

Prior to beginning the ride, defendants' trail guide, Kate Ridge, asked all the participants about their riding experience. Erin Hawkins indicated that she had only ridden a horse once before when she was eleven-years-old, and Bret indicated that he had never ridden a horse. In light of Bret's lack of experience, Ridge assigned him "Tye," a horse that defendants typically assign to beginning riders, including children, because he was calm and easy to ride. Plaintiffs were given basic instructions regarding how to stay on the horse and how to use the reins. According to Ridge, she saddled the horses before the ride and then double-checked all the saddles both before and after the horses were mounted. Bret claimed that after mounting Tye, he complained to Ridge that his saddle was not securely fastened, and she checked it again. Ridge

stated that she did not recall Bret telling her his saddle was loose before the ride and she did not notice that it was loose while he was mounting the horse.

The ride started out at a slow walk, but after awhile, Ridge asked the participants if they wanted to go a little faster. The group responded, "Yes," and Ridge told them to hold on to the saddlehorn with one hand and to put the other hand on the back of the saddle, and to yell if they wanted to slow down. According to plaintiffs, Ridge and her horse then "bolted" into a fast, or full-out run, and the other horses followed her lead. Both plaintiffs stated that when their horses began running they were too surprised or shocked to yell and were just trying to hang on. According to Bret, his saddle slid to the right and he grabbed the saddlehorn and the back of the saddle as instructed but was still falling off his horse. He stated that his arm hit a tree so hard that he suffered a humeral fracture. He then fell from the horse.

Defendants and Ridge denied that the horses were running. According to defendants, midway through the ride, Ridge asked the participants if they would like to begin a "short trot." According to Ridge, a trot is a fast walk, "slower than a canter, and much slower than a run or gallop." Other experienced riders in the group characterized a trot in similar language. After asking for but hearing no objections, defendants contended that Ridge then proceeded to trot the horses. Defendant noted that if anyone had stated that they did not want to trot, Ridge would not have began the trot and continued with the walk. Defendant also explained that horses are not permitted to engage in a "fast run" during rides.

Plaintiffs filed a complaint alleging gross negligence. Defendants moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10), arguing, in pertinent part, that given the facts, even if there was a question of fact regarding whether defendants' conduct amounted to negligence, reasonable jurors could not differ that defendants' conduct did not amount to gross negligence. Defendant pointed out that Ridge attested that a couple seconds after commencing the trot she heard a scream and turned around to see that Bret had dropped his reins and was hanging on to the saddle horn with both hands, which she instructed him not to do. Ridge stated that Bret was losing his balance and leaning far to the right and he fell off his horse after hitting a tree branch. One of the other participants attested that he checked the saddle after the fall and it was not loose. Defendants argued that Bret's injuries were not the result of defendants' negligence, but of "the inherent risk of equine activity," his own lack of experience, and his failure to follow Ridge's instructions.

The trial court indicated that there was no question that plaintiffs' allegations related to securing the saddle and instructing the participants only amounted to negligence. With respect to the allegation that the horses were made to run off at a high rate of speed, defendants continued to contend that there was no question of fact because Ridge and the other experienced participants stated that they began to trot, and the only people who said the horses began to run were plaintiffs, who had little or no riding experience. Plaintiffs responded that the differing accounts meant that there was a factual dispute, thereby precluding summary disposition. The court concluded that, given plaintiffs' lack of experience compared with the experienced opinions of the guide and other participants, there was no genuine issue of fact that the horses were trotting not running. The court then concluded that even if it were a high speed run, reasonable minds could not differ that defendants' conduct did not amount to gross negligence. Accordingly, the court granted defendants summary disposition.

II. STANDARD OF REVIEW

Plaintiffs now argue that the trial court erred in granting defendants summary disposition on the issue of gross negligence. We agree. This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Under MCR 2.116(C)(7), a party may move for dismissal of a claim on the ground that a claim is barred because of a release. Neither party is required to file supportive material. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Any documentation that is provided to the court, however, must be admissible evidence and must be considered by the court. MCR 2.116(G)(5). The plaintiff's well-pleaded factual allegations, affidavits, or other admissible documentary evidence must be accepted as true and construed in the plaintiff's favor, unless contradicted by documentation submitted by the movant. *Maiden*, *supra* at 119. Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. The motion tests the factual support for a claim, and when reviewing the motion, the court must consider all the documentary evidence in the light most favorable to the nonmoving party. *Id*. at 119; see also MCR 2.116(G)(4).

III. ANALYSIS

As an initial matter, plaintiffs' testimony was admissible because it was based on their personal observations and perceptions. MRE 602. To the extent that plaintiffs' testimony merely amounted to opinion, such testimony would nevertheless be admissible evidence. MRE 701. "MRE 701 allows opinion testimony by a lay witness as long as the opinion is rationally based on the perception of the witness and helpful to a clear understanding of his testimony or a fact in issue." *Sells v Monroe Co*, 158 Mich App 637, 644-645; 405 NW2d 387 (1987). "[O]nce a witness's opportunity to observe is demonstrated, the opinion is admissible in the discretion of the trial court, and the weight to be accorded the testimony is for the jury to decide." *Id*. at 646-647. Moreover, laypersons are permitted to testify regarding speed. *Mitchell v Steward Oldford & Sons, Inc*, 163 Mich App 622, 629-630; 415 NW2d 224 (1987). Therefore, that plaintiffs lacked experience with horses merely goes to the weight of their testimony not to its admissibility.

The concept of gross negligence has developed in recent years, evolving from its common law roots. The common-law rule was originally invoked in *Gibbard v Cursan*, 225 Mich 311; 196 NW 398 (1923), to "circumvent the harsh rule of contributory negligence[,]" which at the time would have barred the plaintiff's recovery. *Jennings v Southwood*, 446 Mich 125, 129; 521 NW2d 230 (1994). The *Gibbard* definition was not crafted to be a higher degree of negligence; rather, it was simply "mere[] ordinary negligence of the defendant that follow[ed] from the negligence of the plaintiff." *Id*. at 130. In actuality it was really just "the doctrine of last clear chance in disguise." *Id*. at 132. Noting that such a construction was no longer viable after abandonment of the doctrine of contributory negligence in favor of pure comparative negligence and because it was not in keeping with the Legislature's intent of limiting liability in certain contexts, the *Jennings* Court renounced further application of the *Gibbard* gross negligence definition. *Id*. at 132, 135

Presented with the potentially arduous task of constructing a new definition of gross negligence in the context of the emergency medical services act (EMSA), MCL 333.20901 *et seq*.,[1] the *Jennings* Court simply borrowed language from the government tort liability act (GTLA), MCL 6911.1401 *et seq*. *Jennings, supra* at 135-136. The Court reasoned that the short cut was permissible given that the two statutory schemes shared the same purpose of insulating certain employees from liability for ordinary negligence. *Id*. at 136-137. Thus, the Court stated that in the context of the EMSA, gross negligence should be defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Id*. at 136; see MCL 691.1407(7)(a).

Subsequently, the definition has been employed in other Michigan statutes limiting liability for ordinary negligence while still allowing liability for gross negligence. *Xu v Gay*, 257 Mich App 263, 269; 668 NW2d 166 (2003). The GTLA definition of gross negligence adopted in *Jennings*, arises in statutory contexts where there is a public policy rationale for limiting certain parties' liability while still affording the public recourse when the parties' conduct rises to the level of recklessness described in the definition. See *id*. (citing various examples of statutes using the same definition of gross negligence). Noting that a contractual waiver of liability can similarly serve to insulate against ordinary negligence but not gross negligence, this Court expanded the scope of application of the *Jennings*/GTLA gross negligence definition, likewise adopting the definition to address a claim of gross negligence where the decedent signed a waiver purporting to release a privately-owned fitness center from liability. *Id*. The *Xu* Court concluded that summary disposition for the defendant was proper where, viewing the evidence in the light most favorable to the plaintiff, reasonable minds could not differ that the defendant's mere ignorance of industry safety standards did not constitute conduct so reckless as to demonstrate a substantial lack of concern for whether an injury resulted to the decedent. *Id*. at 270-271. "Evidence of ordinary negligence does not create a question of fact regarding gross negligence." *Id*. at 271.

Here, plaintiffs executed a release and indemnification waiver, in accordance with § 6 of the EALA. MCL 691.1666. By signing the release, plaintiffs agreed that because plaintiffs were participants in an equine activity defendants were not liable for plaintiffs' injury or death resulting from an inherent risk of the equine activity. MCL 691.1666(3); MCL 691.1663. "Inherent risk of an equine activity" is defined by the EALA as:

> a danger or condition that is an integral part of an equine activity, including, but not limited to, any of the following:

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[1] MCL 333.20965(1) states:

> Unless an act or omission is the result of gross negligence . . . , the acts or omissions of a medical first responder, emergency medical technician, [etc.,] . . . do not impose liability in the treatment of a patient on those individuals or any of the following persons . . . .

(i) An equine's propensity to behave in ways that may result in injury, harm, or death to a person on or around it.

(ii) The unpredictability of an equine's reaction to things such as sounds, sudden movement, and people, other animals, or unfamiliar objects.

(iii) A hazard such as a surface or subsurface condition.

(iv) Colliding with another equine or object. [MCL 691.1662(f).]

However, the EALA provides exceptions to this general immunity for certain acts, including negligence on the part of the equine professional.[2] Thus, solely applying the EALA, plaintiffs' claims of negligence and, by implication, gross negligence, would not be barred.

However, the release that plaintiffs signed specifically relieved defendants of liability for negligence, and they were bound to the terms as agreed. Thus, in the face of a contractual waiver of liability insulating defendants against ordinary negligence, the trial court properly focused on whether defendants' conduct constituted gross negligence. See *Xu*, *supra* at 269. Accordingly, following the precedent set by *Xu*, in addressing this claim of gross negligence, we

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[2] MCL 691.1665 states:

Section 3 does not prevent or limit the liability of an equine activity sponsor, equine professional, or another person if the equine activity sponsor, equine professional, or other person does any of the following:

(a) Provides equipment or tack and knows or should know that the equipment or tack is faulty, and the equipment or tack is faulty to the extent that it is a proximate cause of the injury, death, or damage.

(b) Provides an equine and fails to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity and to determine the ability of the participant to safely manage the particular equine. A person shall not rely upon a participant's representations of his or her ability unless these representations are supported by reasonably sufficient detail.

(c) Owns, leases, rents, has authorized use of, or otherwise is in lawful possession and control of land or facilities on which the participant sustained injury because of a dangerous latent condition of the land or facilities that is known to the equine activity sponsor, equine professional, or other person and for which warning signs are not conspicuously posted.

(d) Commits a negligent act or omission that constitutes a proximate cause of the injury, death, or damage.

consider "whether reasonable minds could differ regarding whether defendant[s'] conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury resulted." *Xu, supra* at 269. Accord *Jennings, supra* at 130.

> "[G]enerally, once a standard of conduct is established, the reasonableness of an actor's conduct under the standard is a question for the factfinder, not the court." *Tallman v Markstrom*, 180 Mich App 141, 144; 446 NW2d 618 (1989). "However, if, on the basis of the evidence presented, reasonable minds could not differ, then the motion for summary disposition should be granted." *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992). . . . [T]hese established precedents form the boundaries of our review. Accordingly, our task is to review the facts, in the light most favorable to the plaintiff, and determine the appropriateness of summary disposition in favor of the defendant. [*Jackson v Saginaw Co*, 458 Mich 141, 146-147; 580 NW2d 870 (1998).]

Viewing the evidence in the light most favorable to plaintiffs, it should be accepted as true that after asking the trail ride participants if they wanted to speed up a little bit, Ridge then bolted into a high-speed run – or at the very least, a ride that was too fast given plaintiffs' lack of experience. While the trial court concluded that Ridge's conduct "would not be gross negligence *even if it were a high speed run*," we disagree. We conclude that viewing the evidence in the light most favorable to plaintiffs, reasonable minds could differ regarding whether her conduct of taking a totally inexperienced rider on a fast ride was so reckless as to demonstrate a substantial lack of concern for whether an injury resulted.

In his dissent, our colleague Judge Murray emphasizes that the trail guide placed plaintiff (1) on a safe horse; (2) tightened the saddle; (3) provided safety instructions; (4) started slowly; and (5) sped up only after all riders including plaintiff agreed. We agree that the first four points referenced above appear reasonable. However, in our collective opinion, our point of departure from our esteemed colleague's dissenting opinion is the trail guide's decision to speed up the pace when plaintiff had never ridden a horse before. For a first time rider, yelling "Whoa Nellie" or in this instance, "Whoa Tye" hoping to slow the horse down or to obtain the trail guide's attention for help could be difficult. Here, reasonable minds could indeed differ as to whether the conduct of the trail guide rose to the level of recklessness required to establish gross negligence. The question of whether the trail guide in this case demonstrated a substantial lack of concern for whether an injury resulted is a question of fact upon which reasonable minds could differ. Therefore, it is appropriate for a jury to make this determination.

By participating in the horseback ride, plaintiffs agreed to undertake the inherent risk of an equine activity. But, absent some unexpected event, Ridge was in control of the horses' speed, as the guide riding the lead horse. And Bret's horse "bolted" not because it was scared, which would clearly be an inherent risk of an equine activity, but because it was following Ridge's lead. It cannot be disputed that she made the conscious decision to "speed things up a little bit," knowing that Bret lacked the requisite experience to control the animal on which he rode. It would seem that it was indisputably an important part of Ridge's job to look after the safety of those placed in her care. And asking an inexperienced horseback rider whether he objected to such a ride cannot insulate her conduct.

Horseback riding, an activity in which people are exposed to all the inherent risks of dealing with an animal's individual propensities and unpredictable nature, is a dangerous activity in and of itself. See MCL 691.1662(f). A reasonable person could conclude that Ridge's conduct of taking plaintiffs on a fast ride given their known lack of experience unreasonably added to the risks of the already dangerous activity and was thus so reckless as to demonstrate a substantial lack of concern for whether an injury resulted. Therefore, summary disposition in this case was not appropriate.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Bill Schuette